

*Chapter 4: Alternatives for the Final Rule:  
Environmental Impact Assessment of  
Nongovernmental Activities in Antarctica*

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## **Chapter 4. Alternatives for the Final Rule: Environmental Impact Assessment of Nongovernmental Activities in Antarctica**

### **4.1. Introduction**

Public Law 104-227, the Antarctic Science, Tourism, and Conservation Act of 1996 (the Act), amends the Antarctic Conservation Act of 1978, 16 U.S.C. §2401 *et seq.*, to implement the Protocol on Environmental Protection (the Protocol) to the Antarctic Treaty of 1959 (the Treaty). The Act provides that EPA promulgate regulations to provide for:

... the environmental impact assessment of nongovernmental activities, including tourism, for which the United States is required to give advance notice under Paragraph 5 of Article VII of the Treaty, and

... coordination of the review of information regarding environmental impact assessments received from other Parties under the Protocol.

On April 30, 1997, EPA promulgated an Interim Final Rule that establishes requirements for the environmental impact assessment of nongovernmental activities and coordination of the review of information regarding environmental impact assessment received by the United States, as specified above (40 CFR §8.1(a)); the Interim Final Rule is reproduced in Appendix 19.

EPA issued the Interim Final Rule without public notice or an opportunity for public comment.<sup>1</sup> In doing so, EPA stated its plans for public comment in the development of the final regulations.<sup>2</sup> The final rule will be proposed and promulgated in accordance with the provisions of the Administrative Procedure Act (5 U.S.C. §553) which requires notice to the public, description of the substance of the proposed rule and an opportunity for public comment. Further, EPA committed to prepare an EIS to consider the environmental impacts of the proposed rule and alternatives, and that would address the environmental and regulatory issues raised by interested agencies, organizations, groups and individuals (40 CFR Part 8, Preamble I.B). The purpose of this Chapter is to describe and analyze the alternatives for the final rule and the public participation process used in developing these alternatives.

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<sup>1</sup> Although the Act gave EPA two years to promulgate regulations, the U.S. sought immediate ratification of the Protocol which, in turn, required EPA to have regulations in effect contemporaneous with ratification since the regulations provide nongovernmental operators with the specific requirements they must meet in order to comply with the Protocol. Accordingly, immediate promulgation of the Interim Final Rule was necessary so that the U.S. could ratify the Protocol and implement its obligations under the Protocol as soon as the Protocol entered into force. Because of the importance of facilitating the Protocol's prompt entry into force, EPA believed it had good cause under 5 U.S.C. §553(b)(B) to find that implementation of notice and comment procedures for the Interim Final Rule would be contrary to the public interest and unnecessary (40 CFR Part 8 Preamble I.B).

<sup>2</sup> The Interim Final Rule states in Section 8.1(d) that it will be replaced by a final rule.

## 4.2. Proposed Alternatives for the Final Rule

Based on its experience with the Interim Final Rule and the comments and information received during scoping, EPA has identified five alternatives for the final rule.<sup>3</sup> Alternative 1, the “No Action” Alternative, would propose to promulgate the Interim Final Rule as the final rule. The other four alternatives involve modifications to the Interim Final Rule, and thus Alternative 1. The modifications are based on consideration of the issues raised by EPA and on the comments received on these issues and other information received during scoping. EPA’s preferred alternative is Alternative 2, the Interim Final Rule with certain procedural and administrative modifications. Table 4.1 lists the five proposed alternatives. The proposed alternatives are discussed and analyzed in Section 4.3.

<b>Table 4.1. Proposed Alternatives for the Final Rule</b>	
Alternative 1:	No Action Alternative - Promulgate the Interim Final Rule as the final rule
Alternative 2:	Preferred Alternative - Interim Final Rule with certain procedural and administrative modifications
Alternative 3:	Interim Final Rule with modifications beyond those considered to be procedural or administrative
Alternative 4:	"Substantive" rule
Alternative 5:	"Discretionary" rule

## 4.3. Process for Delineating the Final Rule Alternatives

EPA relied on the scoping process to identify the significant issues that need detailed analysis and those issues which are not significant (40 CFR §1501.7).<sup>4</sup> As discussed in Section 1.3, EPA conducted two public scoping meetings. Written comments were received from the International Association of Antarctica Tour Operators (IAATO), individual tour operators, The Antarctica Project/Antarctic and Southern Ocean Coalition (TAP/ASOC), the public, and the National Science Foundation. Copies of the letters and written statements received are presented in Appendix 20.

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<sup>3</sup> EPA initially suggested not promulgating a final rule as a No Action Alternative (F.R. 62 No. 90). However, this is not an acceptable alternative because it does not meet the purpose and need to which EPA is responding in proposing the alternatives including the proposed action. EPA is directed by the Act to promulgate such a rule because such regulations are necessary so that the U.S. has the ability to implement its obligations under the Protocol.

<sup>4</sup> Scoping is the early and open process for determining the scope of issues to be addressed in an EIS and for identifying the significant issues related to the proposed action. Significant issues are those to be analyzed in depth in the EIS and issues which are not significant are identified and eliminated from detailed study. (40 CFR Part 1501.7, Scoping) For purposes of developing the alternatives for this EIS, issues are considered significant if EPA received conflicting, negative, or otherwise substantive comment on them, including environmental concerns.

EPA used its experience with the Interim Final Rule and the comments and information received during scoping in developing the alternatives for the final rule.

As part of the scoping process, EPA stated its intent to consider ten specific issues along with any other relevant issues raised by the public (F.R. 62, No. 90). In some cases, EPA for reasons of completeness, addresses issues which the U.S. government does not have authority to implement because they are inconsistent with the provisions of the Protocol, EPA and other federal agencies lack statutory authority under the Act to issue regulations incorporating such provisions, and because the Act requires that the regulations be consistent with Annex I to the Protocol with respect to nongovernmental activities. Many of the issues for which the U.S. government does not have authority to implement were raised by the public during scoping.

The ten issues summarized for the initial public scoping meeting are as follows:<sup>5</sup>

1. Time frames for environmental documentation submittal and review;
2. Level of definition of EPA's review criteria;
3. Appropriate monitoring regime, if any;
4. Options for streamlining documentation requirements;
5. Mitigation: what measures and for which activities;
6. Cumulative impacts;
7. Possible "categorical exclusions;"
8. Public comment on IEEs;
9. Reconsideration of the process for review of environmental documents received from other Parties; and
10. Reevaluation of the paperwork projections in the Interim Final Rule.

#### **4.3.1. Scoping Issues and Other Items That Do Not Require Detailed Analysis**

During the scoping process, EPA did not receive conflicting, negative, or otherwise substantive comment on six of the ten above listed issues posed during scoping. Five of these (Items 1, 3, 5, 6 and 9) involve operative provisions in the Interim Final Rule, and Item 10 addresses the accuracy of EPA's estimate of the burden on the operators to comply with the Interim Final Rule as delineated in the Preamble.<sup>6</sup> Table 4.2 correlates these items with their coverage in the Interim Final Rule or its Preamble. These provisions will be carried forth in the five alternatives in the same manner

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<sup>5</sup> Public Scoping Meeting for Draft Environmental Impact Statement in support of Final Rule-Making for "Environmental Impact Assessment of Nongovernmental Activities in Antarctica." EPA. July 8, 1997.

<sup>6</sup> See Appendix 19 for the Interim Final Rule and its Preamble.

they are included in the Interim Final Rule, and because they are not significant they will be retained in the five alternatives without detailed analysis.<sup>7</sup>

<b>Table 4.2. Scoping Issues That Do Not Need Detailed Analysis and Their Associated Provision in the Interim Final Rule</b>	
<b><i>EPA Scoping Issue</i></b>	<b>Delineated in 40 CFR Part 8, Section 8.X</b>
<b><i>Scoping Issue 1. Time frames for environmental documentation submittal and review</i></b>	
A. Specific schedules for submitting EIA documentation are listed in the Interim Final Rule for each of the three levels of documentation: Preliminary Environmental Review Memorandum (PERM), Initial Environmental Evaluation (IEE), and Comprehensive Environmental Evaluation (CEE)	8.6, 8.7, 8.8
B. Provision for waiver or modification of deadlines for submitting environmental documentation	8.5(b)
<b><i>Scoping Issue 3. Appropriate monitoring regime, if any</i></b>	
[TAP/ASOC noted that as more guidance and information on monitoring is developed under the Antarctic Treaty System, such guidance could be incorporated into the regulations at a later date.]	8.7, 8.8, 8.9
<b><i>Scoping Issue 5. Mitigation: what measures and for which activities</i></b>	
[The National Science Foundation noted that if an operator preparing an IEE chooses to mitigate and the mitigation reduces the impact from more than minor or transitory to minor or transitory, the operator should be required to follow through with the proposed mitigation; otherwise, to comply with the regulations, the operator's decision would be to prepare a CEE.]	8.4(a)(7), 8.7, 8.8
<b><i>Scoping Issue 6. Cumulative impacts<sup>8</sup></i></b>	
<b><i>Scoping Issue 9. Reconsider process for review of environmental documents received from other Parties</i></b>	
<b><i>Scoping Issue 10. Reevaluate paperwork projections in Interim Final Rule</i></b>	
	Preamble, VII

Under the Interim Final Rule, Section 8.11 provides that it is unlawful for any operator to violate the regulations, and that violators are subject to civil and criminal enforcement proceedings, and penalties, pursuant to the Antarctic Conservation Act. The National Science Foundation is

<sup>7</sup> For the final rule, the general process for determining the burden will remain unchanged even though the estimated burden on the operators will need to be revised to reflect the current number of operators.

<sup>8</sup> E.g., the process for considering cumulative impacts as stated in the Interim Final Rule.

responsible for civil penalties and taking other administrative enforcement actions, and the Department of Justice is responsible for civil and criminal judicial enforcement.<sup>9</sup> EPA did not receive conflicting, negative, or otherwise substantive comment on this provision. Accordingly, this provision will be included in Alternatives 1 through 4 without detailed analysis. It is not a provision of Alternative 5 for reasons discussed in Section 4.4.5 for this Alternative.

During scoping, commentors provided information concerning Antarctic tourism which has a general bearing on the development of a final rule but does not raise issues that need to be analyzed in detail. Appendix 21 lists this information and indicates how it was considered in the development of the alternatives.

Suggestions were also made to EPA during scoping which are beyond the scope of the final rule. These suggestions included producing a film explaining the concept of the Protocol, and preparing recommendations for travelers and scientists on avoiding environmental impacts in Antarctica.<sup>10</sup>

#### **4.3.2. Significant Issues Identified During Scoping That Require Detailed Analysis**

During the scoping process, EPA received conflicting, negative, or otherwise substantive comment on four of the ten above listed issues posed during scoping. Three of these (Items 4, 7, and 8) relate to possible procedural provisions that could be incorporated into the final rule. The fourth, Item 2, involves the potential for provisions that are more than procedural in nature. These issues that require detailed analysis have been grouped into the following three categories:

- A. Issues related to the requirements to be applied to operators and EPA's role in the EIA process for nongovernmental operators.<sup>11</sup>
- B. Issues concerning the scope of the application of the final rule and consideration of other Parties' requirements.

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<sup>9</sup> Enforcement actions may include civil and criminal proceedings, and penalties, pursuant to Sections 7, 8, and 9 of the Antarctic Conservation Act, as amended by the Act; 16 U.S.C. §§2407, 2408, 2409, and 45 CFR part 672.

<sup>10</sup> It should be noted that "Guidance for Visitors to the Antarctic" has been adopted by the ATCM for nongovernmental activities through Recommendation XVIII-1. Also, most U.S.-based tour operators use the video, "Behold Antarctica," produced by the National Science Foundation, and an IAATO-produced slide show to brief passengers.

<sup>11</sup> This category includes issues relevant to EPA Scoping Issue 2: *Level of definition of EPA's review criteria* as list in Section 4.3.

C. Process-oriented issues.<sup>12</sup>

The issues in these three categories are listed in Table 4.3. The considerations associated with them have been proposed as modifications under one or more of the Alternatives, as appropriate. The analysis of the five Alternatives includes an analysis of each of the modifications that would be made to the Interim Final Rule under that Alternative with the modification analyzed in detail under the Alternative where it is first proposed. For each of these issues, Appendix 22 identifies the commentors and summarizes their comments on the issue; the Appendix also lists the requirements, if any, under the Interim Final Rule that are related to the issue.

Alternatives 3 and 4 incorporate modifications related to issues for which the U.S. government does not have authority to implement because they are inconsistent with the provisions of the Protocol, EPA and other federal agencies lack statutory authority under the Act to issue regulations incorporating such provisions, and because the Act requires that the regulations with respect to nongovernmental activities be consistent with Annex I to the Protocol. Alternative 5 incorporates modifications under which the U.S. government would not be able to ensure that its obligations under the Protocol would be fulfilled. In this case, Alternative 5 would also be inconsistent with the provisions of the Protocol and, thus, contrary to the requirements of the Act. These three Alternatives incorporate modifications related to issues raised during scoping which EPA, for reasons of completeness, addressed. These Alternatives are included for purposes of public disclosure. However, the U.S. government does not advocate pursuing these Alternatives.

<b>Table 4.3. Significant Issues Identified During Scoping</b>
<b>Category A: Issues related to the requirements to be applied to operators and EPA's role in the EIA process for nongovernmental operators</b>
1. <u>Article 3 of the Protocol</u> . Consider a substantive requirement that compliance with the provisions of Article 3 of the Protocol be demonstrated in EIA documentation (see Appendix 23).
2. <u>Prevention of Activities</u> . Consider preventing an activity from proceeding if the anticipated impacts are determined to be unacceptable.
3. <u>Requirement for Insurance and Bonding</u> . If substantive provisions cannot be included in the final rule, consider requiring insurance and bonding to ensure corrective actions are taken where the impacts of a nongovernmental action cause actual environmental harm.
4. <u>EPA Review and Determination on EIA Documentation</u> . Consider whether EPA should continue to review EIA documentation to determine if it meets the requirements of Article 8 and Annex I of the Protocol the provisions of the rule, and whether the associated enforcement provision should be retained (see Appendix 23).

<sup>12</sup> This category includes issues relevant to EPA Scoping Issues, as listed in Section 4.3, as follows:  
 Scoping Issue 4: *Options for streamlining documentation requirements*;  
 Scoping Issue 7: *Possible "categorical exclusions;"* and  
 Scoping Issue 8: *Public comment on IEEs*.

<b>Table 4.3. Significant Issues Identified During Scoping</b>
5. <u>Elaboration of Factors to be Considered in the EIA</u> . Consider whether EIA documentation should be required to address compliance with other applicable provisions of the Protocol and relevant U.S. statutes.
6. <u>New Sites</u> . Consider whether a CEE should be required for planned tourist expeditions to new sites.
<b>Category B: Issues concerning the scope of the application of the final rule and consideration of other Parties' requirements</b>
1. <u>Definition of Operator</u> . Consider whether the definition of operator should include foreign operators "doing business in the United States" in order to cover foreign-based operators carrying U.S. citizens. If this is not feasible, consider applying the EIA requirements to all U.S. citizens going to Antarctica on nongovernmental expeditions.
2. <u>Reciprocity Provision</u> . Consider an automatic reciprocity provision for environmental documentation prepared for other Parties and submitted by a U.S.-based operator.
<b>Category C: Process-oriented issues</b>
1. <u>Multi-Year Environmental Impact Assessments (EIA)s</u> . Consider including a provision for multi-year EIAs.
2. <u>PERMs</u> . Consider eliminating the PERM provision in the Interim Final Rule.
3. <u>Categorical Exclusions</u> . Consider including a provision for categorical exclusions and categorically exclude Antarctic ship-based tourism conducted according to the "Lindblad Model."
4. <u>Public Comment on IEEs</u> . Consider requiring a formal public review process for IEEs similar to that provided for CEEs.
5. <u>Threshold for "More Than a Minor or Transitory Impact."</u> Consider including a definition, or other provision, that would establish a threshold for "more than a minor or transitory impact."

#### 4.4. Analysis of the Alternatives for the Final Rule

##### 4.4.1. Alternative 1: No Action Alternative - Promulgate the Interim Final Rule as the Final Rule

Under Alternative 1, the No Action Alternative, EPA would propose to promulgate the Interim Final Rule as the final rule without modification,<sup>13</sup> except for changing the effective date of the rule and making necessary edits including: changing the mailing address to be used for submitting EIA documentation, removing the schedule for CEEs for the 1998-1999 season (Section 8.8(b)(1)), and updating the paperwork projections based on the current number of operators (Preamble VII). As required by the Act, Alternative 1 provides for:

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<sup>13</sup> The following elements were raised by EPA as Scoping Issues. However, EPA did not receive significant comment on any of these. Therefore, the associated provisions from the Interim Final Rule, as delineated in Table 4.2, will be carried forth in Alternative 1: Time frames for environmental documentation submittal and review (Scoping Issue 1); Appropriate monitoring regime, if any (Scoping Issue 3); Mitigation: what measures and for which activities (Scoping Issue 5); Cumulative impacts (Scoping Issue 6); Reconsider process for review of environmental documents received from other Parties (Scoping Issue 9); and Reevaluate paperwork projections in Interim Final Rule (Scoping Issue 10; see Preamble).



... the environmental impact assessment of nongovernmental activities, including tourism, for which the United States is required to give advance notice under Paragraph 5 of Article VII of the Treaty, and

... coordination of the review of information regarding environmental impact assessments received from other Parties under the Protocol.

Selection of Alternative 1 for proposed promulgation would ensure that nongovernmental operators identify and assess the potential impacts of their proposed activities, including tourism, on the Antarctic environment; that operators consider these impacts in deciding whether or how to proceed with proposed activities; and that operators provide environmental documentation pursuant to the Act and Annex I of the Protocol. The procedures in Alternative 1 are consistent with and implement the EIA provisions of Article 8 and Annex I to the Protocol.<sup>14</sup>

Alternative 1 would retain the definitions of “operator” and “persons”<sup>15</sup> and the approach in the Interim Final Rule of not applying the requirements of the rule to individual U.S. citizens where the individual is not acting as an operator.<sup>16</sup>

Selection of Alternative 1 would reflect a decision to continue with a procedural rule which does not impose obligations beyond preparation of the EIA documentation and the associated assessment and verification procedures. This alternative retains EPA’s authority with the concurrence of the National Science Foundation to make a finding that the documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of the regulations.

Further, Alternative 1 retains the associated enforcement provision that it is unlawful for any operator to violate the regulations.<sup>17</sup> Therefore, even though the Interim Final Rule is procedural, if an operator chooses to mitigate and the planned mitigation measures are the basis for the level of environmental documentation, there is an obligation on the part of the operator to implement the planned mitigation.

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<sup>14</sup> As provided in the Interim Final Rule at Section 8.1(b).

<sup>15</sup> As provided in the Interim Final Rule at Section 8.3.

<sup>16</sup> As provided in the Preamble to the Interim Final Rule in Section II.D.(1). Alternative 1 would also carry forth the provision of the Interim Final Rule at Section 8.2(c) that the final rule would “... not apply to activities undertaken in the Antarctic Treaty area that are governed by the Convention on the Conservation of Antarctic Marine Living Resources or the Convention for the Conservation of Antarctic Seals. Persons traveling to Antarctica are subject to the requirements of the Marine Mammal Protection Act, 16 U.S.C. §1371 *et seq.*” (See Section 5.4.)

<sup>17</sup> As provided in the Interim Final Rule at Section 8.11.

The Interim Final Rule is consistent with U.S. obligations under Article 8 and Annex 1 of the Protocol. By the time the final rule is promulgated, operators and agencies will have had a total of four seasons to become familiar with its requirements and to determine the “workability” of its requirements (F.R. 63, No. 72). EPA did not receive comment during scoping that the Interim Final Rule is not “workable.”

#### **4.4.2. Alternative 2: Preferred Alternative - Interim Final Rule with Certain Procedural and Administrative Modifications**

Alternative 2, EPA’s preferred alternative, would modify the Interim Final Rule to respond to recommendations made during the scoping process to enhance the EIA process by including changes that would ensure consistency between the governmental and nongovernmental EIA processes and that could reduce the time and cost of the EIA process for the nongovernmental operators. This is the alternative EPA believes would best fulfill its statutory mission and responsibilities giving consideration to (F.R. 46, Pg. 18026):

- The ability to ensure that the U.S. is able to comply with its obligations under the Protocol;
- The need for the regulations to be, as directed by the Act, “consistent with Annex I to the Protocol;”
- The preference to ensure consistency between governmental and nongovernmental EIA processes and regulations;
- The assessment of the environmental and other consequences of the alternatives (see Chapter 5);
- The current voluntary standards of the U.S.-based Antarctic tour industry; and
- Concern that U.S.-based operators continue to do business as U.S. operators and not move their Antarctic business operations to a non-Party country because of any undue burden imposed by the final rule.<sup>18</sup>

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<sup>18</sup> EPA is concerned that the final rule not place undue burden on operators, including small business operators. Should this occur, there is a potential for one or more U.S.-based operators to move their operations to another country, including a country not Party to the Protocol. A move to another country cannot be ruled out given the international nature of the tour industry. Adverse consequences on the Antarctic environment could be created if the final rule has the effect of driving U.S.-based operators to non-Party countries where they would become foreign-based operators. If this were to happen, in most instances there would be no obligation on the part of the operator to comply with the planning processes delineated in Article 8 and Annex I of the Protocol leading to decisions about any activities undertaken in Antarctica.

Under Alternative 2, the following modifications would be incorporated into the Interim Final Rule:<sup>19</sup>

1. Make necessary technical modifications and edits including: changing the effective date of the rule, changing the mailing address to be used for submitting EIA documentation, removing the schedule for CEEs for the 1998-1999 season (Section 8.8(b)(1)), and updating the paperwork projections (Preamble VII).
2. Add a provision allowing operators to submit multi-year EIA documentation to address proposed expeditions for a period of up to five austral seasons.
3. Add a definition, or other provision, that would establish a threshold for “more than a minor or transitory impact.”

As with Alternative 1, Alternative 2 would ensure that nongovernmental operators identify and assess the potential impacts of their proposed activities, including tourism, on the Antarctic environment; that operators consider these impacts in deciding whether or how to proceed with proposed activities; and that operators provide environmental documentation pursuant to the Act and Annex I of the Protocol. These procedures, including the proposed procedural and administrative modifications, would be consistent with and implement the EIA provisions of Article 8 and Annex I to the Protocol.

Alternative 2 retains the definitions of “operator” and “persons” and the approach in the Interim Final Rule of not applying the requirements of the rule to individual U.S. citizens where the individual is not acting as an operator.<sup>20</sup>

Selection of Alternative 2 for proposed promulgation would reflect a decision to continue with a procedural rule which does not impose obligations beyond preparation of the EIA documentation and the associated assessment and verification procedures. Alternative 2 retains EPA’s authority with the concurrence of the National Science Foundation to make a finding that the

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<sup>19</sup> The following elements were raised by EPA as Scoping Issues. However, EPA did not receive significant comment on any of these. Therefore, the associated provisions from the Interim Final Rule, as delineated in Table 4.2, will be carried forth in Alternative 2: Time frames for environmental documentation submittal and review (Scoping Issue 1); Appropriate monitoring regime, if any (Scoping Issue 3); Mitigation: what measures and for which activities (Scoping Issue 5); Cumulative impacts (Scoping Issue 6); Reconsider process for review of environmental documents received from other Parties (Scoping Issue 9); and Reevaluate paperwork projections in Interim Final Rule (Scoping Issue 10; see Preamble).

<sup>20</sup> Alternative 2 would also carry forth the provision of the Interim Final Rule at Section 8.2(c) that the final rule would “... not apply to activities undertaken in the Antarctic Treaty area that are governed by the Convention on the Conservation of Antarctic Marine Living Resources or the Convention for the conservation of Antarctic Seals. Persons traveling to Antarctica are subject to the requirements of the Marine Mammal Protection Act, 16 U.S.C. §1371 *et seq.*” (See Section 5.4.)

documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of the regulations. As in Alternative 1, if an operator chooses to mitigate and the mitigation measures are the basis for the level of environmental documentation, EPA assumes the operator will proceed with these mitigation measures. Otherwise, the documentation may not have met the requirements of Article 8 and Annex I and the provisions of the regulations. Alternative 2 retains an enforcement provision that it is unlawful for any operator to violate the regulations.

Multi-Year EIA Documentation. Alternative 2 would add a provision allowing operators to submit multi-year EIA documentation to address proposed expeditions for a period of up to five consecutive austral summer seasons. For expeditions that are specifically identified and assessed on a multi-year basis, this provision would eliminate the need for annual submission of EIA documentation provided that the conditions described in the multi-year document, including the assessment of cumulative impacts, are unchanged. The multi-year provision also would allow operators to update basic information and to provide information on additional activities to supplement the multi-year environmental document without having to revise and re-submit the entire document.<sup>21</sup> Adding a provision to allow for submission of multi-year EIA documentation could reduce the burden on the operators.<sup>22 23</sup>

Threshold for “more than a minor or transitory impact”: Alternative 2 would add a definition, or other provision, that would establish a threshold for “more than a minor or transitory impact.” The Protocol does not define “minor or transitory.” Under the added definition (or provision), the term “more than a minor or transitory impact” would have the same meaning as “significantly affecting the quality of the human environment.” This is consistent with EPA’s implementation of the Interim Final Rule.<sup>24</sup> This is also the same threshold definition applied to the environmental impact assessment of governmental activities in Antarctica (16 U.S.C. §2401 *et seq.*). Thus, adding such a definition (or provision) would ensure consistency between the governmental and nongovernmental EIA

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<sup>21</sup> The other paperwork reduction provisions now in Section 8.4(d) of the Interim Final Rule also would be part of the final rule under Alternative 2 and could be applied, as appropriate.

<sup>22</sup> Under the Paperwork Reduction Act, 44 U.S.C. §3501 *et seq.*, “burden” means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency.

<sup>23</sup> This provision would also reduce the burden on the federal government in terms of the effort to review the documentation and the effort associated with filing and maintaining the files associated with annual documentation.

<sup>24</sup> As provided in the interpretive information for the Interim Final Rule in the Preamble, Section II.D.4: “In evaluating whether a CEE is the appropriate level of environmental documentation, the EPA will consider the impact in terms of the context of the Antarctic environment and the intensity of the activity. ... EPA believes a comparable threshold should be applied in determining whether an activity may have an impact that is more than minor or transitory under these interim final regulations as is used in determining if the activity will have a ‘significant’ effect for purposes of the National Environmental Policy Act. C.f. 40 CFR §1508.27”

requirements and would provide guidance to nongovernmental operators on the EIA documentation requirements for their proposed activities.

#### **4.4.3. Alternative 3: Interim Final Rule with Modifications Beyond Those Considered to be Procedural or Administrative**

Alternative 3 describes modifications to the Interim Final Rule beyond those of Alternative 2 that are considered to be procedural or administrative, but does not go as far as Alternatives 4 and 5 in changing the basic approach set out in the Interim Final Rule. These modifications are based on issues raised in the scoping process. Under Alternative 3, the following modifications, which are inconsistent with the provisions of the Protocol and for which there is no legal authority under the Act,<sup>25</sup> would be incorporated into the Interim Final Rule:<sup>26</sup>

1. Incorporate all three of the procedural and administrative modifications proposed under Alternative 2.
2. Broaden the definition of operator to include foreign operators “doing business in the United States.” If this is not feasible, then apply the final rule to all U.S. citizens going to Antarctica on nongovernmental expeditions.
3. Require that EIA documentation demonstrate compliance with other applicable provisions of the Protocol and relevant U.S. statutes.

As with Alternatives 1 and 2, Alternative 3 would ensure that nongovernmental operators identify and assess the potential impacts of their proposed activities, including tourism, on the Antarctic environment; that operators consider these impacts in deciding whether or how to proceed with proposed activities; and that operators provide environmental documentation pursuant to the Act and Annex I of the Protocol.

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<sup>25</sup> Alternative 3 is one of the Alternatives that incorporates modifications related to issues raised during scoping which EPA, for reasons of completeness, is addressing even though the U.S. government does not have authority to implement because they are inconsistent with the provisions of the Protocol, EPA and other federal agencies lack statutory authority under the Act to issue regulations incorporating such provisions, and because the Act requires that the regulations with respect to nongovernmental activities be consistent with Annex I to the Protocol. These three Alternatives are included for purposes of public disclosure. However, the U.S. government does not advocate pursuing these Alternatives.

<sup>26</sup> The following elements were raised by EPA as Scoping Issues. However, EPA did not receive significant comment on any of these. Therefore, the associated provisions from the Interim Final Rule, as delineated in Table 4.2, will be carried forth in Alternative 3: Time frames for environmental documentation submittal and review (Scoping Issue 1); Appropriate monitoring regime, if any (Scoping Issue 3); Mitigation: what measures and for which activities (Scoping Issue 5); Cumulative impacts (Scoping Issue 6); Reconsider process for review of environmental documents received from other Parties (Scoping Issue 9); and Reevaluate paperwork projections in Interim Final Rule (Scoping Issue 10; see Preamble).

Alternative 3 with the proposed changes under modifications 2 and 3 would not be consistent with the Protocol as required by the Act; these modifications are discussed below. Selection of Alternative 3 for proposed promulgation would reflect a decision to continue with a procedural rule which does not impose obligations beyond preparation of the EIA documentation and the associated assessment and verification procedures. Alternative 3 retains EPA's authority with the concurrence of the National Science Foundation to make a finding that the documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of the regulations. As with Alternatives 1 and 2, if an operator chooses to mitigate and the mitigation measures are the basis for the level of environmental documentation, EPA assumes the operator will proceed with these mitigation measures. Otherwise, the level of documentation may not have met the requirements of Article 8 and Annex I and the provisions of the regulations. Alternative 3 retains an enforcement provision that it is unlawful for any operator to violate the regulations.

Broadened Definition of "Operator": Under Alternative 3, a provision would be added to broaden the definition of operator to include foreign operators "doing business in the United States."<sup>27</sup> Parties to the Protocol require that their nongovernmental operators undertake environmental impact assessment of proposed activities in accordance with Article 8 and Annex I to the Protocol. Countries that are not Parties have no such obligations.<sup>28</sup> The reason to broaden the definition of "operator" would be to require foreign-based operators from countries that are not Parties to the Treaty that carry U.S. passengers to submit EIA documentation to EPA.

Article 8 requires Parties to ensure that the assessment procedures set out in Annex I are applied to "...tourism and all other ... nongovernmental activities in the Antarctic Treaty area for which advance notice is required under Article VII(5) of the Antarctic Treaty ...." Article VII(5) provides that a Party must give notice for "... all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory." Similarly, the Act explicitly requires environmental impact assessments of nongovernmental activities organized in or proceeding from the U.S. for which the United States is required to give advance notice under Article VII(5) of the Treaty. Thus, for purposes of the Act, the United States can assert jurisdiction over operators only where the relevant expedition is organized in or proceeding from the

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<sup>27</sup> Alternative 4 would retain the provision of the Interim Final Rule at Section 8.2(c) that the final rule would "... not apply to activities undertaken in the Antarctic Treaty area that are governed by the Convention on the Conservation of Antarctic Marine Living Resources or the Convention for the conservation of Antarctic Seals. Persons traveling to Antarctica are subject to the requirements of the Marine Mammal Protection Act, 16 U.S.C. §1371 *et seq.*" (See Section 5.4.)

<sup>28</sup> For example, Canada has not yet ratified the Protocol. Marine Expeditions, a Canadian-based operator, has no legal obligation to undertake an environmental impact assessment of its proposed expeditions. Based on information in IAATO's annual passenger estimates, it is estimated that Marine Expeditions may carry about 12% of the U.S. citizens traveling to Antarctica. (This estimate assumes that for 10,000 total ship-based Antarctic tourists, Marine Expeditions carries about 12% of these passengers and that 40% of these are U.S. citizens.) However, in 2001, Marine Expeditions filed for bankruptcy; its future status as an Antarctic tour operator is unknown.

United States. It is conceivable that a non-U.S. based operator could conduct such a level of activity within the United States that it could be deemed to be organizing an activity in the United States, and thus the United States would have jurisdiction in such a circumstance. Nevertheless, mere sale of tickets by a foreign operator, for example, would not rise to the level of organizing an expedition in the United States. In these circumstances, EPA believes that a provision amending the definition of “operator” to any foreign operator merely “doing business in the United States” would be too broad and thus inconsistent with the Treaty’s requirement that the expedition be organized in or proceeding from the United States.

Require that the EIA Documentation Demonstrate Compliance with Applicable Provisions of the Protocol and Relevant U.S. Statutes: Alternative 3 would include a provision requiring that EIA documents demonstrate compliance with other applicable provisions of the Protocol and relevant U.S. statutes. Such a provision is not required by Annex I or the Act. Further, certain provisions of the Act are the responsibility of other federal agencies. Under the Interim Final Rule, operators may, and do, reference compliance with appropriate Protocol provisions and U.S. regulations as planned mitigation measures for their activities, measures which support the level of EIA documentation for the planned activities. The environmental documentation provides a useful mechanism to identify whether a proposed activity raises issues under other obligations of the Protocol or domestic law which need further review by the responsible authority. Based on its experience to date, EPA does not believe that a blanket requirement to demonstrate compliance would necessarily reduce environmental impacts.<sup>29</sup> Such a provision would impose obligations and a burden on U.S. nongovernmental operators not required under Annex I or the Act, nor would it be fully consistent with the U.S. governmental EIA requirements regarding U.S. governmental activities in Antarctica.

#### **4.4.4. Alternative 4: “Substantive” Rule**

Alternative 4 would modify the Interim Final Rule to include substantive requirements in association with the environmental documentation requirements for nongovernmental activities in Antarctica, and to provide for federal direction over the level of environmental documentation required. Under Alternative 4, the following modifications, which are inconsistent with the provisions

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<sup>29</sup> Under Article 8, the assessment procedures set out in Annex I are to be applied in the planning processes leading to decisions about any activities undertaken in the Antarctic Treaty area. Annex I requires that the environmental impacts of proposed activities be considered.

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of the Protocol and for which there is no legal authority under the Act,<sup>30</sup> would be incorporated into the Interim Final Rule.<sup>31</sup>

1. Incorporate all three of the procedural and administrative modifications proposed under Alternative 2.
2. Incorporate the two additional modifications proposed in Alternative 3.
3. Add a substantive requirement that compliance with the provisions of Article 3 of the Protocol be demonstrated in EIA documentation.
4. Add a provision which would allow the federal government to prevent an activity from proceeding if anticipated impacts are determined to be unacceptable. If a substantive provision cannot be included in the final rule, include a provision to require insurance and bonding to ensure corrective actions are taken where the impacts of a nongovernmental action cause actual environmental harm.
5. Add a provision for public notice and comment on IEEs similar to the process for CEEs.
6. Add a provision to require a CEE when any new landing sites are included, or are proposed as possible landing sites, in the itinerary of expeditions by nongovernmental operators.

As with Alternatives 1, 2 and 3, Alternative 4 would ensure that nongovernmental operators identify and assess the potential impacts of their proposed activities, including tourism, on the Antarctic environment; that operators consider these impacts in deciding whether or how to proceed with proposed activities; and that operators provide environmental documentation pursuant to the Act and Annex I of the Protocol.

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<sup>30</sup> Alternative 4 is one of the Alternatives that incorporates modifications related to issues raised during scoping which EPA, for reasons of completeness, is addressing even though the U.S. government does not have authority to implement because they are inconsistent with the provisions of the Protocol, EPA and other federal agencies lack statutory authority under the Act to issue regulations incorporating such provisions, and because the Act requires that the regulations with respect to nongovernmental activities be consistent with Annex I to the Protocol. These three Alternatives are included for purposes of public disclosure. However, the U.S. government does not advocate pursuing these Alternatives.

<sup>31</sup> The following elements were raised by EPA as Scoping Issues. However, EPA did not receive significant comment on any of these. Therefore, the associated provisions from the Interim Final Rule, as delineated in Table 4.2, will be carried forth in Alternative 3: Time frames for environmental documentation submittal and review (Scoping Issue 1); Appropriate monitoring regime, if any (Scoping Issue 3); Mitigation: what measures and for which activities (Scoping Issue 5); Cumulative impacts (Scoping Issue 6); Reconsider process for review of environmental documents received from other Parties (Scoping Issue 9); and Reevaluate paperwork projections in Interim Final Rule (Scoping Issue 10; see Preamble).



Alternative 4 retains EPA's authority with the concurrence of the National Science Foundation to make a finding that the documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of the regulations. Alternative 4 also retains an enforcement provision that it is unlawful for any operator to violate the regulations. As with the first three Alternatives, if planned mitigation measures are the basis for the level of documentation there is an obligation on the part of the operator to implement the planned mitigation. Otherwise, the level of documentation might not have met the requirements of the Protocol and the regulations.

Alternative 4 would include the two additional modifications listed under Alternative 3. These would be: a provision to broaden the definition of "operator" to include foreign-based operators "doing business in the U.S.," or to apply EIA requirements to all U.S. citizens, and a provision requiring that EIA documents include a discussion of compliance with other applicable provisions of the Protocol and relevant U.S. statutes.<sup>32</sup>

Substantive Provisions and Insurance and Bonding: Selection of Alternative 4 would reflect a decision to propose to promulgate a final rule which would impose substantive obligations beyond the procedural requirements for preparation of the EIA documentation and the associated assessment and verification procedures inherent in Alternatives 1, 2 and 3. First, Alternative 4 would include a provision that would require that an operator demonstrate in the EIA that the proposed activities will be planned and conducted to ensure they take place in a manner consistent with the principles in Article 3, and be modified, suspended or canceled if they result in or threaten to result in impacts upon the Antarctic environment or dependent or associated ecosystems. Further, Alternative 4 would include a provision that would prevent an activity from proceeding if EPA's review of the EIA, with the concurrence of the National Science Foundation, determined that the projected impacts would be unacceptable under Article 3.

However, under the Act, the U.S. government does not have any authority to prevent activities for which proper environmental assessments have been undertaken provided the proposed activities are not otherwise in conflict with U.S. law.<sup>33</sup> Further, Article 3 of the Protocol is implemented through the Annexes to the Protocol and is not capable of direct implementation. Thus, it in and of itself does not impose mandatory requirements. Moreover, Article 8 provides for an EIA process but does not impose substantive requirements (Scully 1993). Therefore, the two substantive modifications proposed under Alternative 4 are inconsistent with the Protocol and the Act.

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<sup>32</sup> See discussion of these issues under Alternative 3.

<sup>33</sup> Certain activities may be illegal under U.S. laws or may be legal only with a permit issued by the responsible authority. For example, it is illegal to "take" a native bird or mammal, or engage in harmful interference with plants, unless such activities are reviewed and permitted by the National Science Foundation. Further, under the Interim Final Rule and this Alternative, persons traveling to Antarctica are subject to the requirements of the Marine Mammal Protection Act, 16 U.S.C. §1371 *et seq.* (see Appendix 27).

This federal policy is also consistent with NEPA requirements since NEPA's implementing regulations at 40 CFR Parts 1500-1508 provide procedural requirements for environmental impact assessment and do not impose obligations to carry out substantive environmental measures. Because NEPA is the model for governmental EIAs in Antarctica,<sup>34</sup> the substantive elements proposed under Alternative 4 would result in an inconsistency with the way that EIA provisions are applied to governmental and nongovernmental operators.

If a provision cannot be added which would allow the federal government to prevent an activity from proceeding if anticipated impacts are determined to be unacceptable, then Alternative 4 would impose an insurance and bonding requirement on operators for mitigation in case there are unacceptable impacts that require corrective action. Such a provision is not required under Annex I, nor is it consistent with it since Annex I contemplates activities that may have impacts that could be more than minor or transitory (e.g., CEE-level activities). It would, however, impose obligations and undue burden on U.S. nongovernmental operators not required under Annex I or the Act.

Public Notice and Comment on IEEs: Alternative 4 would add a provision for public notice and comment on IEEs similar to the process for CEEs including an obligation on the part of preparers to respond to points raised in the public comment process. This process is not required by Article 8 and Annex I for EIA documentation except for CEEs. Under the Interim Final Rule, EPA publishes notice of receipt of IEEs on one of its websites and makes copies available to the public upon request.<sup>35</sup> Based on its experience to date, there has been no evidence that interested parties have been unable to obtain IEEs and to offer comments to the operators under this notification scheme. Such a provision would not necessarily reduce environmental impacts. It would, however, impose obligations and undue burden on U.S. nongovernmental operators not required under Annex I or the Act, and would not be consistent with the EIA requirements that apply to U.S. governmental entities.

CEE Requirement for Proposed New Landing Sites: Alternative 4 would establish a requirement that a CEE be prepared when any new sites are proposed as possible landing sites in the itinerary of expeditions by nongovernmental operators. It is reasonable for operators to identify when any new landing sites are included or are proposed as possible landing sites. Consistent with Article 8 and Annex I, Section 8.4(b) of the Interim Final Rule directs that operators preparing an IEE or CEE should consider, as applicable, whether and to what degree the proposed activity may affect various elements of the environment; this would also include the environment of any new site. To the extent that a visit to a new site would have the potential to result in impacts that are more than minor or transitory, an operator would prepare a CEE to be in compliance with the regulations. However, there is not a scientific basis for concluding that any visit to a new site would always have the likelihood of

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<sup>34</sup> Governmental activities must comply with the EIA requirements of the Act which states that "[t]he obligations of the United States under Article 8 of and Annex I to the Protocol shall be implemented by applying the National Environmental Policy Act of 1969 (42 U.S.C. §4321 *et seq.*) to proposals for Federal agency activities in Antarctica as specified in this section." 16 U.S.C. §2403a.

<sup>35</sup> As provided in the Preamble to the Interim Final Rule in Section II.D.3.(b).

a greater than minor or transitory impact; thus, the conclusion that a CEE should be prepared in every case is not supported. Such a provision would not necessarily reduce environmental impacts, but would impose obligations and undue burden on U.S. nongovernmental operators not required under Annex I or the Act, and would not be consistent with the EIA requirements that apply to U.S. governmental entities.

#### **4.4.5. Alternative 5: “Discretionary” Rule**

Alternative 5 would modify the Interim Final Rule by eliminating EPA’s responsibility for making a finding with the concurrence of the National Science Foundation that the documentation submitted does not meet the requirements of Article 8 and Annex I and the provisions of the regulations. This would eliminate the U.S. government’s ability to ensure that the United States is able to comply with its obligations under the Protocol.

Under Alternative 5, the following modifications, which would not adequately ensure that the U.S. is fulfilling its obligations under the Protocol,<sup>36</sup> would be incorporated into the Interim Final Rule:<sup>37</sup>

1. Incorporate all three of the procedural and administrative modifications proposed under Alternative 2.
2. Eliminate the provisions in the Interim Final Rule that provide for EPA to make a finding with the concurrence of the National Science Foundation that the documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of the regulations.<sup>38</sup>

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<sup>36</sup> Alternative 5 is one of the three Alternatives that incorporate modifications related to issues which EPA included for reasons of completeness. Alternative 5 incorporates modifications under which the U.S. government would not be able to ensure that its obligations under the Protocol would be fulfilled. These three Alternatives are included for purposes of public disclosure. However, the U.S. government does not advocate pursuing these Alternatives.

<sup>37</sup> The following elements were raised by EPA as Scoping Issues. However, EPA did not receive significant comment on any of these. Therefore, the associated provisions from the Interim Final Rule, as delineated in Table 4.2, will be carried forth in Alternative 5: Time frames for environmental documentation submittal and review (Scoping Issue 1); Appropriate monitoring regime, if any (Scoping Issue 3); Mitigation: what measures and for which activities (Scoping Issue 5); Cumulative impacts (Scoping Issue 6); Reconsider process for review of environmental documents received from other Parties (Scoping Issue 9); and Reevaluate paperwork projections in Interim Final Rule (Scoping Issue 10; see Preamble).

<sup>38</sup> As provided in the Interim Final Rule at Section 8.6(a), 8.7(c) and 8.8(b)(2).

3. Eliminate the enforcement provision in the Interim Final Rule.<sup>39</sup>
4. Eliminate the preliminary environmental review provision in the Interim Final Rule.<sup>40</sup>
5. Add a provision to provide for an automatic reciprocity when environmental documentation prepared for other Parties is submitted by a U.S.-based operator.
6. Add a provision for “Categorical Exclusions” including a categorical exclusion for Antarctic ship-based tourism conducted according to the “Lindblad Model.”

Similar to Alternatives 2 through 4, Alternative 5 would make the necessary technical modifications and edits and would add provisions that would provide for submission of multi-year EIA documentation and a threshold for “more than a minor or transitory impact.” Alternative 5 would retain the Interim Final Rule’s definitions of “operator” and “persons” and the approach of not applying the requirements of the rule to individual U.S. citizens where the individual is not acting as an operator.<sup>41</sup> Selection of Alternative 5 for proposed promulgation would reflect a decision to continue with a procedural rule which does not impose obligations beyond preparation of the EIA documentation and the associated assessment and verification procedures.

Elimination of EPA Review and Determination on EIA Documentation and the Associated Enforcement Provision: Under Alternative 5, nongovernmental operators would be required to identify and assess the potential impacts of their proposed activities, including tourism, on the Antarctic environment; consider these impacts in deciding whether or how to proceed with proposed activities; and provide environmental documentation pursuant to the Act and Annex I of the Protocol. However, under modification 2, the U.S. government would not have a role in determining when the environmental documentation does not meet the requirements of Article 8 and Annex I of the Protocol.<sup>42</sup> While EPA could offer comments to the operator, there would be no obligation for the operator to address EPA’s comments. Thus, although the documentation may not meet the requirements of Article 8 and Annex I, under Alternative 5, the United States would not be able to

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<sup>39</sup> As provided in the Interim Final Rule at Section 8.11.

<sup>40</sup> As provided in the Interim Final Rule at Section 8.6.

<sup>41</sup> Alternative 5 would also carry forth the provision of the Interim Final Rule at Section 8.2(c) that the final rule would “... not apply to activities undertaken in the Antarctic Treaty area that are governed by the Convention on the Conservation of Antarctic Marine Living Resources or the Convention for the conservation of Antarctic Seals. Persons traveling to Antarctica are subject to the requirements of the Marine Mammal Protection Act, 16 U.S.C. §1371 *et seq.*” (See Section 5.4.)

<sup>42</sup> E.g., with consideration of the planned mitigation procedures to be applied to the activities, a PERM must be able to conclude that impacts will be less than minor or transitory; an IEE must be able to conclude that impacts will be no more than minor or transitory; and a CEE concludes that impacts will be more than minor or transitory.

ensure it is able to comply with its obligations under the Protocol.<sup>43</sup> In keeping with the discretionary nature of Alternative 5, modification 3 would eliminate the enforcement provision.<sup>44</sup>

The Interim Final Rule was constructed to ensure that the United States would be able to comply with its obligations under the Protocol (40 CFR Part 8, Preamble Section I.B.). It has been EPA's experience over the past four years in carrying out reviews in consultation with other interested federal agencies, that the initial draft of the environmental documentation provided by the U.S.-based operators did not always support a conclusion consistent with the level of impact for the proposed activities described.<sup>45</sup> Based on this experience, EPA does not believe that the approach under modification 2 would allow the U.S. government to ensure that the assessment procedures set out in Annex I are appropriately applied by U.S.-based operators in the planning processes leading to their decisions about any activities undertaken in the Antarctic Treaty area.

PERM Provision: Alternative 5 would eliminate the preliminary environmental review provision of the Interim Final Rule at Section 8.6.<sup>46</sup> The operator would not be required to submit a PERM for proposed activities where the operator determines that the proposed activity would have less than a minor or transitory impact. The operator would be required to submit the basic information requirements listed in Section 8.4, information similar to the information sent to the Department of State for purposes of Advance Notice of expeditions to Antarctica.

However, Section 8.6 of the Interim Final Rule directs that the preliminary review process assess the potential direct and reasonably foreseeable indirect impacts on the Antarctic environment of the proposed expedition in sufficient detail to assess whether the proposed activity may have less than a minor or transitory impact, a requirement that leads to consistency with Article 8 and Annex I of the Protocol. This process is not part of or inherent in the information requirements of Section 8.4. For operators who provide only Advance Notice for their expeditions, the U.S. government would be in the position of assuming first, that these operators have undertaken this assessment process, and second, that they have conducted it in such a manner that it met the requirements of the

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<sup>43</sup> By removing the provisions whereby EPA can make a finding with the concurrence of the National Science Foundation that the documentation does not meet the requirements of Article 8 and Annex I of the Protocol, the stated purpose of the Interim Final Rule at Section 8.1 is nullified along with the applicability and effect statement at Section 8.2(a). Under Alternative 5, these provisions of the Interim Final Rule would also need to be eliminated, or modified accordingly.

<sup>44</sup> As provided in the Interim Final Rule at Section 8.11.

<sup>45</sup> In all cases, EPA subsequently found that the revised or supplemented environmental documentation submitted by the operators met the requirements of Article 8 and Annex I and the requirements of the Interim Final Rule.

<sup>46</sup> Under the Interim Final Rule, a *Preliminary Environmental Review Memorandum (PERM)* means the documentation supporting the conclusion of the preliminary environmental review that the impact of a proposed activity will be less than minor or transitory on the Antarctic environment. (40 CFR §8.3.)

Protocol. As noted above, it has been EPA's experience over the past four years, that operators' initial draft EIAs did not always support a conclusion consistent with the level of impact for the proposed activities described in the documentation, including the draft PERM submitted for a planned 1999-2000 expedition. Based on past experience, EPA does not believe that eliminating the PERM provision would allow EPA, and thus the U.S. government, to ensure that the assessment procedures set out in Annex I are appropriately applied in the planning processes leading to decisions about any activities undertaken in the Antarctic Treaty area. Further, the U.S. governmental EIA regulations include a provision for preliminary environmental reviews; thus, elimination of the PERM provision would not be consistent with the U.S. governmental EIA procedures and regulations.

Reciprocity Provision: Under modification 5, Alternative 5 would add a provision to provide for an automatic reciprocity when environmental documentation prepared for other Parties is submitted by a U.S.-based operator.<sup>47</sup> However, it is the responsibility of the United States to comply with its obligations under the Protocol. Thus, while this is a "workable" provision, the U.S. government would need to determine whether, in an appropriate case, it should rely on the regulatory procedures of another Party.

Categorical Exclusions: Under modification 6, Alternative 5 would add a provision for categorical exclusions including a categorical exclusion for Antarctic ship-based tourism conducted according to the "Lindblad Model." The National Environmental Policy Act defines 'categorical exclusion' as "a category of actions which do not individually or cumulatively have a significant effect on the human environment ... and for which, therefore, neither an environmental assessment nor an environmental impact statement is required" (40 CFR §1508.4.). Under federal NEPA regulations, only narrow and specific classes of activities are categorically excluded from environmental review.<sup>48</sup> IAATO recommended that Antarctic ship-based tourism organized under a carefully defined "Lindblad Model" be categorically excluded.<sup>49</sup> However, IAATO's proposal to categorically exclude Antarctic ship-based tourism conducted under a "Lindblad Model" does not fit well with the approach used by the U.S. government for categorical exclusions because it does not identify actions to be excluded in sufficient detail. Further, more needs to be known about potential cumulative impacts of nongovernmental activities undertaken by U.S.-based ship-based tour operators before deciding to exclude some or all of these specific activities. A categorical exclusion provision could, however, be

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<sup>47</sup> "Automatic" implies that there are no previous agreements between the U.S. and other Parties on reciprocity for EIA documentation.

<sup>48</sup> For example, EPA in its NEPA regulations at 40 CFR Part 6.107(d) excludes "...actions which are solely directed toward minor rehabilitation of existing facilities..." and NSF in its environmental assessment regulations at CFR 45 Part 641 (c) (1) and (2) excludes certain scientific activities (e.g., use of weather/research balloons that are to be retrieved) and interior remodeling and renovation of existing facilities.

<sup>49</sup> IAATO did not provide a specific definition for the "Lindblad Model."

an amendment to the final rule in the future if one or more appropriate categorical exclusions are identified.<sup>50</sup>

#### **4.5 Summary of the Alternatives for the Final Rule and EPA's Preferred Alternative**

In summary, five alternatives have been identified for the final rule:

Alternative 1: No Action Alternative - Promulgate the Interim Final Rule as the final rule

Alternative 2: Preferred Alternative - Interim Final Rule with certain procedural and administrative modifications

Alternative 3: Interim Final Rule with modifications beyond those considered to be procedural or administrative

Alternative 4: "Substantive" rule

Alternative 5: "Discretionary" rule

Alternative 1, the "No Action" Alternative, would propose to promulgate the Interim Final Rule as the final rule. The other four alternatives involve modifications to the Interim Final Rule, and thus Alternative 1.

Alternatives 3, 4 and 5 incorporate modifications related to issues raised during scoping which EPA addressed for reasons of completeness, but for which the U.S. government does not have authority under the Act to implement because they are inconsistent with the provisions of the Protocol. The Act requires that the regulations be consistent with it, thus, EPA (or any other federal agency) lacks statutory authority under the Act to incorporate such provisions into regulations. These Alternatives are included for purposes of public disclosure. However, the U.S. government does not advocate pursuing these Alternatives.

Alternative 2 is EPA's preferred Alternative. As required by the Act, Alternative 2 would provide for:

... the environmental impact assessment of nongovernmental activities, including tourism, for which the United States is required to give advance notice under Paragraph 5 of Article VII of the Treaty, and

... coordination of the review of information regarding environmental impact assessments received from other Parties under the Protocol.

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<sup>50</sup> The final rule would have to be amended through the appropriate rule-making procedures to add a provision for categorical exclusions.

Alternative 2 would ensure that nongovernmental operators identify and assess the potential impacts of their proposed activities, including tourism, on the Antarctic environment; that operators consider these impacts in deciding whether or how to proceed with proposed activities; and that operators provide environmental documentation pursuant to the Act and Annex I of the Protocol. These procedures, including the proposed procedural and administrative modifications, would be consistent with and implement the EIA provisions of Article 8 and Annex I to the Protocol. This is the alternative EPA believes would best fulfill its statutory mission and responsibilities giving consideration to:

- The ability to ensure that the U.S. is able to comply with its obligations under the Protocol;
- The need for the regulations to be, as directed by the Act, “consistent with Annex I to the Protocol;”
- The preference to ensure consistency between governmental and nongovernmental EIA processes and regulations;
- The assessment of the environmental and other consequences of the alternatives as discussed in Chapter 5;
- The current voluntary standards of the U.S.-based Antarctic tour industry; and
- Concern that U.S.-based operators continue to do business as U.S. operators and not move their Antarctic business operations to a non-Party country because of any undue burden imposed by the final rule.